

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY

IN RE: . Case No. 22-19361-MBK  
. (Jointly Administered)  
BLOCKFI INC., et al., .  
. .  
Debtors. .  
. . . . . OFFICIAL COMMITTEE OF . Adv. Case No. 23-01144-MBK  
UNSECURED CREDITORS, .  
. .  
Plaintiff, . Clarkson S. Fisher U.S.  
. Courthouse  
v. . 402 East State Street  
. Trenton, NJ 08608  
BLOCKFI INC., et al., .  
. .  
Defendants. . September 21, 2023  
. . . . . 11:31 a.m.

TRANSCRIPT OF MOTION TO LIFT THE AUTOMATIC STAY,  
MOTION TO FILE UNDER SEAL THE D&O POLICY, AND  
MOTION TO DISMISS THE ADVERSARY PROCEEDING  
BEFORE THE HONORABLE MICHAEL B. KAPLAN  
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

APPEARANCES:

For the United States U.S. Department of Justice, Civil Div.  
of America: By: SETH BRANDON SHAPIRO, ESQ.  
1100 L Street, N.W. 8142  
Washington, DC 20530

For the U.S. Trustee: Office of the U.S. Trustee  
By: JEFFREY M. SPONDER, ESQ.  
One Newark Center, Suite 2100  
Newark, NJ 07102

Audio Operator: Kiya Martin

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268 Evergreen Avenue  
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E-mail: jjcourt@jjcourt.com

(609) 586-2311 Fax No. (609) 587-3599

APPEARANCES (Cont'd) :

For the Official Committee of Unsecured Creditors: Brown Rudnick, LLP  
By: SHARI I. DWOSKIN, ESQ.  
One Financial Center  
Boston, MA 02111

Brown Rudnick, LLP  
By: KENNETH AULET, ESQ.  
7 Times Square  
New York, NY 10036

Genova Burns LLC  
By: DONALD W. CLARKE, ESQ.  
110 Allen Road, Suite 304  
Basking Ridge, NJ 07920

TELEPHONIC APPEARANCES:

For the U.S. Trustee: Office of the U.S. Trustee  
By: LAUREN BIELSKIE, ESQ.  
One Newark Center, Suite 2100  
Newark, NJ 07102

For Bermuda Joint Provisional Liquidators: Faegre Drinker Biddle & Reath LLP  
By: RICHARD BERNARD, ESQ.  
1177 Avenue of the Americas  
41st Floor  
New York, NY 10036

For Flori Marquez and Zachary Prince: Porzio, Bromberg & Newman, P.C.  
By: DEAN M. OSWALD, ESQ.  
1675 Broadway, Suite 1810  
New York, NY 10019

Zukerman Gore Brandeis & Crossman  
By: KAREN S. PARK, ESQ.  
Eleven Times Square, 15th Floor  
New York, NY 10036

Shearman & Sterling  
By: DONALD GOLD, ESQ.  
599 Lexington Avenue  
New York, NY 10022

For Yuri Mushkin: Lazare Potter Giacovas & Moyle  
By: ANNA PIA FELIX, ESQ.  
747 Third Avenue  
New York, NY 10017

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1                   THE COURT: All right. Good morning, everyone. This  
2 is Judge Kaplan, and this morning we'll be hearing a couple of  
3 matters in the BlockFi, Inc. case.

4                   I have counsel, certain counsel who are present in  
5 court, and I have counsel who are appearing remotely. Let me  
6 start with those in court and ask for appearances.

7                   MR. SHAPIRO: Good morning, Your Honor. Seth Shapiro  
8 on behalf of the United States America.

9                   THE COURT: Thank you. It's always nice to see you  
10 in Trenton.

11                  MR. SHAPIRO: Thank you. It's nice to be here.

12                  MS. DWOSKIN: Good morning, Your Honor. Shari  
13 Dwoskin from Brown Rudnick on behalf of the Committee.

14                  THE COURT: Thank you.

15                  MS. DWOSKIN: This is my partner Ken Aulet, who you  
16 know well.

17                  THE COURT: I've seen him a couple of times.

18                  MR. CLARKE: Good morning, Judge. Don Clarke, Genova  
19 Burns, local counsel for the Committee.

20                  THE COURT: Thank you, Mr. Clarke.

21                  MR. SPONDER: Good morning, Your Honor. Jeff Sponder  
22 from the Office of the United States Trustee. I believe Lauren  
23 Bielskie is also participating, but she is virtual. Thank you.

24                  THE COURT: All right. Let me have appearances from  
25 those who are appearing remotely.

1 MR. BERNARD: Thank you, Your Honor. Richard Bernard  
2 of Faegre Drinker on behalf of the Bermuda Joint Provisional  
3 Liquidators.

4 THE COURT: All right. Thank you. Anyone else?

5 MS. OSWALD: Good morning, Your Honor. This is Dean  
6 Oswald from Porzio Bromberg & Newman serving as local counsel  
7 to Flori Marquez and Zac Prince. I'm joined virtually by my  
8 co-counsel Karen Park of Zukerman Gore Brandeis & Crossman and  
9 Dan Gold of Shearman & Sterling.

10 THE COURT: All right. Thank you, all.

11 MR. GOLD: Good morning.

12 THE COURT: Good morning.

13 MS. PARK: Good morning, Your Honor.

14 THE COURT: Anyone else?

15 MS. FELIX: Yes, good morning, Your Honor. This is  
16 Anna Pia Felix from the Law Firm of Lazare Potter Giacovas &  
17 Moyle. Our firm represents Yuri Mushkin, and we had filed a  
18 joinder with Zachary Prince.

19 THE COURT: All right. Thank you. Good morning.  
20 And I think that's it. For those who are appearing remotely,  
21 as always, please use the raise hand function if you need to be  
22 called upon, unless I've already called on you.

23 Let's start with the motion of Zachary Prince and  
24 Flori Marquez for lifting the automatic stay to access certain  
25 funds or reimbursement under an existing insurance policy. I

1 think it has been mentioned, I received a joinder on behalf of  
2 Yuri Mushkin. I've not received any opposition. Does anybody  
3 wish to address the matter of either in favor of or in  
4 opposition to the requested relief?

5 MR. GOLD: Your Honor, Dan Gold from Shearman &  
6 Sterling, counsel for Zac Prince. As you note, our motion for  
7 an order lifting the automatic stay to the extent applicable,  
8 as well our motion to file under seal the D&O policy, there  
9 have been no objections, so I don't need to be heard on that  
10 unless Your Honor has questions.

11 THE COURT: No, I think it's pretty straightforward.  
12 I don't have any questions. I have no basis to object. I've  
13 read through the request. It seems acceptable. So, absent any  
14 further objection from anyone, I will grant the motion and  
15 enter the dual -- the order later today or tomorrow.

16 MR. GOLD: Thank you, Your Honor.

17 THE COURT: Thank you. Those who are appearing on  
18 that matter may be excused or may stay around for the  
19 entertainment value in the second matter to be addressed.

20 MS. FELIX: Thank you, Your Honor.

21 MS. PARK: Thank you, Your Honor.

22 THE COURT: You're welcome. All right. Then we'll  
23 turn to I'll call it, tongue and cheek, the main event, the  
24 United States motion to dismiss Adversary Number 23-1144. This  
25 is the adversary proceeding brought by -- on behalf of the

1 Committee with respect to certain funds that have been the  
2 subject of a criminal warrant relative to a criminal forfeiture  
3 proceeding relative to a criminal prosecution that is ongoing  
4 out in the State of Washington.

5 Let's get right to it. This is not a new matter for  
6 any of us here. If I may, I'm going to take a little liberty  
7 in that I've had the benefit in the pleadings, in the written  
8 submissions rather to read certain very colorful analogies.  
9 There was flip flops to Air Jordans. There's red Mercedes and  
10 blue Jeeps I think was argued. I'd like to offer a very  
11 simplified fact pattern to form the basis of our argument and  
12 discussions today. I draw the fact pattern from the  
13 allegations in the motions to dismiss, the -- in the underlying  
14 pleadings, which because this is a motion to dismiss I can  
15 infer as true.

16 So, let's say -- I don't even think -- this fact  
17 pattern doesn't even work because we don't have enough people  
18 in the courtroom, but let's say we had eight people in this  
19 courtroom or on -- or appearing remotely who -- one of which is  
20 my law clerk, Becca Earl, who has invested or deposited with  
21 BlockFi a hundred dollars through their accounts, and then our  
22 two criminal defendants also invested a hundred dollars each  
23 with BlockFi through their accounts for a total of a thousand  
24 dollars.

25 Now, BlockFi or BlockFi International maybe more

1 accurately takes this thousand dollars from these respective  
2 accounts and puts it in another BlockFi account owned and  
3 controlled by BlockFi from which it lends, spends, invests all  
4 of the thousand dollars. The account is thereafter  
5 subsequently replenished by BlockFi with other borrowed money,  
6 other loan repayments, other -- new investments and deposits.

7 Now, there comes a point in time where BlockFi has  
8 lost the money and only has \$500 in this BlockFi account, and  
9 BlockFi files for bankruptcy. At this point in time all of our  
10 ten investors, the eight in the courtroom, including Becca, and  
11 the two criminal defendants each have claims for a share of  
12 that \$500 that's there, 500 being lost, 50 percent.

13 Now comes the United States Department of Justice and  
14 lay claims and demands a return of the criminals' full share,  
15 their \$200 that they had put in, a hundred dollars each out of  
16 that \$500, leaving only \$300 to be shared by the remaining  
17 eight. That's the fact pattern it seems pretty  
18 straightforward.

19 So, I would ask the United States to start to explain  
20 why in light of 28 U.S.C. 1334(e) and 28 U.S.C. 157, BlockFi  
21 being in bankruptcy, the money in BlockFi's account, a new  
22 account, a different account than the deposit holders, why I  
23 don't have jurisdiction and authority to determine whether the  
24 original -- the \$500 is property of the bankruptcy estate under  
25 Section 541 and protected under the automatic stay provisions

1 under Section 362. That's one area.

2 Number 2, why I don't have jurisdiction under Section  
3 105 to issue an injunction if necessary, if appropriate.

4 And for me most importantly why is it of sound public  
5 policy to have the remaining eight investors and depositors in  
6 the courtroom put up, including poor old Becca here, put up and  
7 chip in \$12.50 out of the remaining \$50 share that each of them  
8 would have to pay the forfeiture obligations of the criminal  
9 defendants.

10 So, we'll start with that, and I'm here to listen.

11 Counsel?

12 MR. SHAPIRO: Thank you, Your Honor. For the record,  
13 Seth Shapiro for the United States of America.

14 As to your first question with respect to why this  
15 Court would have no jurisdiction to decide that matter, it's  
16 because of 21 U.S.C. Section 853(k) and (n). The United States  
17 believes that that Criminal Code Statute takes precedence over  
18 28 U.S.C. 1334(e). We believe that 28 U.S.C. 1334(e) assumes  
19 that an action is filed before the grant of jurisdiction to the  
20 District Court and the referral to the Bankruptcy Court under  
21 157.

22 The Criminal Code, which is more specific than the  
23 general jurisdictional grant in 1334(e) is very specific, that  
24 no action shall be filed, period, challenging assets subject to  
25 a criminal forfeiture regardless of whether that action is

1 filed in the Bankruptcy Court or any other court in a post-  
2 indictment situation until after the criminal conviction and  
3 the forfeiture proceedings are in progress where parties can  
4 come to the criminal court and actually make a presentation as  
5 to why they should be entitled to the money or why the -- if  
6 they believe tracing is relevant, why the tracing is not  
7 sufficient for the Government to take that money, which it  
8 doesn't keep of course, the Government is acting pursuant to  
9 police and regulatory powers under 362(b)(4), but the  
10 Government takes that money and simply would distribute it to  
11 the victims of the crime.

12           And the Government believes that Congress in its  
13 infinite wisdom decided that in this kind of a situation the  
14 victims of the crime should take precedence over the creditors  
15 of the bankruptcy estate.

16           And there's a case that we cite in our briefs that  
17 kind of discusses that issue. It's the GuildMaster case, and  
18 if I could quote from that. It's in our brief. It says, all  
19 of these issues relating to the relative rights of the parties  
20 in the lamps, which in that case had been seized, namely  
21 whether the lamps are property of the bankruptcy estate in  
22 light of the criminal statutes purporting to vest retroactive  
23 title to Government, whether any of the lamps were or were not  
24 property seized are all issues which necessarily involve the  
25 interpretation and application of a -- of criminal statutes, a

1 task that's outside the scope of this court's jurisdiction  
2 while the criminal action remains pending, and then dismissing  
3 the suit, noting that bankruptcy is not an alternative forum  
4 for deciding criminal actions.

5 So, we take the view that the same is true here, that  
6 questions concerning what assets are subject to these criminal  
7 seizure warrants have to be adjudicated in the Western District  
8 of Washington in the criminal case, and that until the criminal  
9 defendants are extradited from abroad, wherever they might be,  
10 there's a conviction and then there's a forfeiture, no court  
11 can really take jurisdiction over those accounts and that  
12 crypto.

13 THE COURT: Does that hold true in the -- were the  
14 criminals in that case the debtor?

15 MR. SHAPIRO: I believe they were, Your Honor.

16 THE COURT: Does that hold true if -- the criminal  
17 action is not directed against this debtor here, BlockFi, it's  
18 not --

19 MR. SHAPIRO: That's correct.

20 THE COURT: -- nor are these funds -- unless you  
21 could tell me you can trace them, and we've said in my  
22 hypothetical they all went into a new account, and I think  
23 that's pretty much how it worked at BlockFi. There weren't  
24 individual accounts. They were ledger accounting issues, but  
25 apart from wallets, which are not at issue here, there's no

1 separate accounts, the assets don't belong to the debtor  
2 defendant in your -- as in your situation. These assets were a  
3 third party, the debtor here, BlockFi, and tangentially the  
4 customers and depositors who will have a share in it like the  
5 criminal defendants. How is it the same situation?

6 MR. SHAPIRO: Well, we argue that the relation-back  
7 doctrine that applies under federal criminal law is not  
8 dependent upon whether or not the debtor is the criminal  
9 defendant or not, that at the time of the crimes, which  
10 occurred, you know, many, many years ago, between, you know,  
11 five to ten years ago, that all of the crypto at issue and the  
12 accounts, you know, were established in that timeline. And  
13 then that's where the Government's rights to seize because the  
14 case law Payner, Fernandez and the other cases --

15 THE COURT: Rights in what?

16 MR. SHAPIRO: The rights in the accounts --

17 THE COURT: And no --

18 MR. SHAPIRO: -- to seize the accounts --

19 THE COURT: The money in the accounts --

20 MR. SHAPIRO: -- and the crypto.

21 THE COURT: -- right?

22 MR. SHAPIRO: No, it's -- well, the accounts and the  
23 crypto.

24 THE COURT: I mean, how do you seize an account?

25 You're trying to seize the funds.

1                   MR. SHAPIRO: You serve a -- you know, you have the  
2 U.S. Marshals come in, and they serve a warrant or a court  
3 order, as they did from the U.S. magistrate judge, and then --

4                   THE COURT: But aren't --

5                   MR. SHAPIRO: -- the accounts -- the contents of the  
6 accounts, which at that time had been represented to us was the  
7 full amount --

8                   THE COURT: But bank accounts are pretty much debts  
9 under the UCC. It's not really funds sitting in an account.  
10 When we have a checking account, I'd love to think the bank is  
11 holding my money in an account. It's really -- when I deposit  
12 a check, I loan the bank money, and they owe me. It's a debt  
13 from the bank. How are you -- you're seizing --

14                  MR. SHAPIRO: Well --

15                  THE COURT: Aren't you seizing the debt owing?

16                  MR. SHAPIRO: That is not the Government's view in a  
17 criminal case, Your Honor. In a criminal case we see -- we  
18 believe we are seizing the account itself and the contents of  
19 that account, and that's why the Government takes the view that  
20 we are not a creditor of the estate, and we are not a -- we are  
21 not seizing some kind of debt obligation or right to payment as  
22 defined in 1015. We're simply seizing the actual --

23                  THE COURT: What account?

24                  MR. SHAPIRO: -- you know, contents of that account.

25                  THE COURT: Which account? The criminal defendants'

1 account?

2 MR. SHAPIRO: Well, we're seizing the account on file  
3 with BlockFi or BlockFi International, whatever happened to be  
4 the case. We're not seizing the right of the criminal  
5 defendant to the payment. We're seizing the account and its  
6 contents from the innocent stakeholder BlockFi.

7 THE COURT: But doesn't every investor customer in  
8 BlockFi have an account, but those accounts don't necessarily  
9 have anything in them. Once BlockFi exercised its contractual  
10 right to hypothecate, pledge, and they take the money and put  
11 it in a different account. Isn't -- or is it -- can we find  
12 out if that's -- this is a motion to dismiss. Shouldn't we  
13 discover how it operates? I mean, I'm speaking from my  
14 knowledge that I've gleaned from the case so far, but is there  
15 anything in the account you just seized or you're looking to  
16 seize?

17 MR. SHAPIRO: We were told there was. At the time  
18 that the warrants were served, we were informed by counsel for  
19 BlockFi that the money was there.

20 THE COURT: Were you told the money was there or that  
21 there was a debt owed?

22 MR. SHAPIRO: No, the money was there and that they  
23 would cooperate with a turnover, and that's what eventually led  
24 to the negotiation of a stipulation. And as a professional  
25 courtesy, we agree to inform the Creditors' Committee, so they

1 would have an opportunity to come into Your Honor to let Your  
2 Honor --

3 THE COURT: -- and would hear it.

4 MR. SHAPIRO: -- consider it if you --

5 THE COURT: Yes.

6 MR. SHAPIRO: -- wanted to, and that's how we ended  
7 up where we were rather than --

8 THE COURT: I've interrupted enough.

9 MR. SHAPIRO: No, no, I mean, that -- I mean, we  
10 weren't trying to -- I mean, this money is not going to go  
11 anywhere for a long time, right, if we end up seizing it.  
12 We're just trying to take possession.

13 THE COURT: Isn't that the problem for the 600,000  
14 creditors and customers out there?

15 MR. SHAPIRO: Well --

16 THE COURT: Not just the eight in my hypothetical  
17 courtroom. The actual 600,000 who are depending upon seeing a  
18 return of --

19 MR. SHAPIRO: Well --

20 THE COURT: -- their investment from, you know, their  
21 interest in the accounts.

22 MR. SHAPIRO: But they should blame Congress, Your  
23 Honor. They should not blame the United States Justice  
24 Department. I mean, if you look at the Winpar case that we --

25 THE COURT: Well, they're going to blame me, but go

1 ahead.

2 (Laughter)

3 MR. SHAPIRO: But if you look at the Winpar case,  
4 Your Honor, that we cited in our brief, the Court acknowledged  
5 that allowing a forfeiture proceeding to go forward might  
6 benefit the crime victims at the expense of unsecured  
7 creditors, and the Court noted that this outcome does not  
8 significantly outweigh the well-recognized public benefits of  
9 such action, namely the punishment of criminals and the  
10 deterrence of others who might be like-minded.

11 So, because -- you know, we sought forfeiture of the  
12 accounts at issue before BlockFi filed for bankruptcy in  
13 connection with a criminal action. There's no question that  
14 the enforcement of these warrants is excepted from the stay  
15 under 362(b) (4), and that the priority set forth by Congress  
16 are to ensure that those criminal victims are afforded the  
17 opportunity to assert claims to those -- the contents of those  
18 accounts in the criminal forfeiture proceeding in the Western  
19 District of Washington.

20 I think the District Court judge in Washington  
21 deferred to Your Honor to see if he agreed, and we understand  
22 where he was coming from, but as a practical matter, we think  
23 that Your Honor should dismiss the action and let it go back to  
24 Washington --

25 THE COURT: Well --

1 MR. SHAPIRO: -- because the --

2 THE COURT: Or do we take that the District Court  
3 judge recognized this Court's authority under 28 U.S.C.  
4 1334 (e)? I could read it that way, couldn't I?

5 MR. SHAPIRO: Well, he didn't state that on the  
6 record, Your Honor.

7 THE COURT: Oh.

8 MR. SHAPIRO: What he did state is that he doesn't  
9 know very much about bankruptcy, that he had gone out to lunch  
10 with his local bankruptcy judge and explained that there could  
11 be bankruptcy issues here, and since Your Honor is, you know,  
12 the --

13 THE COURT: We're good at lunch.

14 MR. SHAPIRO: Yeah, right, well respected -- no,  
15 you're a well-respected judge, and he wanted to give Your Honor  
16 an opportunity to rule, but that doesn't mean he might not take  
17 back jurisdiction if he thinks that something in it was going  
18 to happen in the case that could -- that goes beyond what he  
19 feels is legally permissible.

20 THE COURT: Doesn't that go back on aside to the  
21 question I asked I think during the stay motion. And by the  
22 way, I did make an error. We have also the stay -- the motion  
23 to stay the action pending withdrawal of the reference that I  
24 carried to today as well.

25 MR. SHAPIRO: That action might be partially mooted

1 by the fact that the District Court last night, Your Honor, you  
2 may not be aware of this, denied our motion to withdraw the  
3 reference without prejudice.

4 THE COURT: Well, see, I got --

5 MR. SHAPIRO: So --

6 THE COURT: I got to keep up.

7 MR. SHAPIRO: No.

8 THE COURT: I didn't know they withdrew. Okay. Then

9 --

10 MR. SHAPIRO: It happened late yesterday. It's not

11 --

12 THE COURT: Okay.

13 MR. SHAPIRO: So, you might want to take some time to  
14 read it. It's a very short decision, but --

15 THE COURT: All right. So, then the -- so that stay  
16 is mooted, the request to stay is mooted --

17 MR. SHAPIRO: Well, to --

18 THE COURT: -- at this point. It would --

19 MR. SHAPIRO: -- an extent. There have been some  
20 other factors that have come up, such as --

21 THE COURT: Okay.

22 MR. SHAPIRO: -- for example, the possible Government  
23 shutdown in a week, and we've talked to opposing counsel about  
24 possibly, you know, maybe waiting to see what happens with the  
25 Government, so that, you know, we don't have to be trying cases

1 while people might not be able to, you know --

2 THE COURT: Right.

3 MR. SHAPIRO: -- be here in New Jersey to argue  
4 before Your Honor.

5 THE COURT: All right. Fair enough. Thank you. No,  
6 I'm glad -- I did not know that Judge Kirsch had ruled on the  
7 motion. Continue or -- I mean, again, I keep interjecting.

8 MR. SHAPIRO: Oh, no, no, that's perfectly fine. I  
9 completely understand. I think you were going to raise the  
10 question about when you asked me at the earlier hearing about  
11 whether or not it was our intention to move to transfer venue  
12 --

13 THE COURT: Right, that --

14 MR. SHAPIRO: -- if -- right, but that was a slight  
15 -- it was not our intention to move to transfer venue of  
16 course, but we intended to of course continue with our motion  
17 to dismiss. And the practical reality is, if Your Honor were  
18 to grant our motion to dismiss, then as a -- the matter would  
19 simply, you know, go back to the District Court and the Western  
20 District of Washington I think by operation of law.

21 THE COURT: Understood.

22 MR. SHAPIRO: So, it's not something intentional that  
23 we would be trying to go there and take the matter away from  
24 Your Honor, but it's obvious, if Your Honor dismisses it, then  
25 some judge is going to have to rule on the enforceability of

1 those seizure warrants and the issue of whether or not those  
2 assets are subject to seizure or not.

3 THE COURT: All right. Again, if you have anything  
4 you wish to add to the papers --

5 MR. SHAPIRO: Well, I --

6 THE COURT: -- it's your opportunity.

7 MR. SHAPIRO: Right. The only other -- there are two  
8 things I'd like to add, the first is the point that I think I  
9 generically made, that we believe the more specific statute is  
10 the Criminal Code Statute, 21 U.S.C. 1853(f) and (n) in  
11 particular, and we believe Your Honor should rule that that  
12 statute should govern over 28 U.S.C. 1334(e)(1) because 1334(e)  
13 (1) presumes that an action can be filed to determine whether  
14 or not the property is property of the estate or not.

15 And obviously if the Criminal Code Statute is the  
16 governing statute, then no action could be filed arguing that  
17 1334(e)(1) grants the Court jurisdiction, and that -- I'm not  
18 so sure that came across very clearly in our briefs, but there  
19 is a general proposition that's been adopted in the Third  
20 Circuit, and we can provide Your Honor with the case law if  
21 you'd like, that the more specific statute should govern over  
22 the more general.

23 THE COURT: All right.

24 MR. SHAPIRO: And then I don't know if this is -- if  
25 Your Honor feels this is relevant to the Court's determination

1 of the issues, but the issue of whether or not this matter  
2 involves a core proceeding or not. We've discussed this pretty  
3 much in depth at the last hearing, but in light of the District  
4 Court's ruling, which Your Honor will have an opportunity to  
5 read at some point within the next week or so, the District  
6 Court of course is doing exactly what Your Honor predicted, is  
7 giving -- has ruled that the motion be denied as essentially  
8 premature because Your Honor has not had an opportunity yet to  
9 rule on the question of whether or not --

10 THE COURT: -- it's core or non-core.

11 MR. SHAPIRO: -- it's core or non-core, as Your Honor  
12 predicted at the last hearing.

13 And so we would say that what's happened here in this  
14 proceeding is that the debtor has taken what is essentially a  
15 criminal forfeiture proceeding and put some bankruptcy labels  
16 on it and terminology and has tried to argue that the automatic  
17 stay is being violated in a way that turns what would  
18 ordinarily be a non-core criminal forfeiture proceeding into a  
19 core proceeding, accusing the Government of violating the  
20 automatic stay by seizing or attempting to seize contents of an  
21 account which belong to the estate.

22 I think at best in the case law that I've seen, the  
23 asset is in limbo. The debtor may have possession of it. The  
24 Government doesn't have possession, but until that forfeiture  
25 proceeding is -- you know, until there is a conviction and the

1 forfeiture proceeding is concluded, we don't really know, Your  
2 Honor, who's entitled to the contents of that account.

3 And if in the confirmed -- in this adversary  
4 proceeding or in the case generally, I think we have a  
5 stipulation on file that says no party will do anything with  
6 the asset until 30 days after a judgment in this adversary  
7 proceeding, but if at some point those contents are distributed  
8 to the unsecured creditors in the case under the -- either on  
9 judgment in this proceeding or in the plan generally, then Your  
10 Honor would be authorizing the contents of those accounts to go  
11 to, you know, creditors of the bankruptcy, which is not what  
12 Congress envisioned. Congress envisioned that if there is a  
13 final forfeiture judgment, it should go to those crime victims.

14 And, yes, I do agree with Your Honor that there is  
15 some prejudice to be suffered by those unsecured creditors  
16 because they have to wait, but, again --

17 THE COURT: Well, it's more than waiting. It's  
18 actually -- as in my hypothetical, it's the fact that if the  
19 Government is successful in accomplishing what you're  
20 attempting to accomplish, then the victims of the criminality  
21 of those two defendants that has nothing to do with BlockFi or  
22 its customers or its investors are being compensated by  
23 BlockFi's customers and investors. It's -- that money or a  
24 portion of it or there -- their entitlement is being reduced.  
25 There's no doubt about it. Their funds are going to be

1 reduced. Their recovery is going to be reduced.

2 MR. SHAPIRO: We respectfully disagree with Your  
3 Honor on that -- from that perspective because we do believe  
4 that the relation-back doctrine gives us the right, even in a  
5 case where the criminal defendants are not the debtor, we  
6 believe it gives us the right to seize for the benefit of the  
7 crime victims what the Government was entitled to between 1998  
8 and two thousand -- I think it was August of 2022 when the  
9 crimes were committed -- were being committed.

10 And as soon as those accounts were open -- well, even  
11 actually not -- even before that, when the crimes were  
12 committed and the criminal defendants had possession of that  
13 crypto, we had the right to seize it all. We had --

14 THE COURT: You have the right because the criminals  
15 had the right.

16 MR. SHAPIRO: No, we had the right because of the  
17 case law. In the criminal jurisprudence that we've cited that  
18 essentially gives us what I said at the last hearing was a time  
19 machine. It gives us something that unsecured creditors don't  
20 -- and creditors generally in bankruptcy don't have. It gives  
21 us the right to go back in time and to see what the  
22 Government's right was at the time the crimes were committed,  
23 well before when the warrants were issued.

24 Once that forfeiture judgment is entered, if we can  
25 show -- and we do have the ability to trace, and we have traced

1 up until the time when the seizure warrants were issued, and  
2 this would come out if we have a trial, Your Honor, we will be  
3 able to show that what the criminal defendants had at that  
4 time, and we should be allowed to seize that.

5 Now, Ms. Dwoskin has very astutely noted that, well,  
6 that might be the case even if the relation-back doctrine  
7 applies, but -- which she contests, but she says, in any event,  
8 BlockFi doesn't have those assets right now, they're gone, she  
9 argues in her brief, that they might be in the hands of Alameda  
10 or somebody else.

11 But what we're saying is that at the time that the  
12 crimes were committed they did have it. It was represented to  
13 us by BlockFi when we served the seizure warrants that they had  
14 it, and so we should be allowed to seize it.

15 THE COURT: But they don't have it now. Let's accept  
16 the premise that they don't have it now. So, you're saying  
17 that you're entitled to it because they had it, but they don't  
18 have it now. So instead of getting other criminal assets,  
19 other assets from the defendants, you're just going to latch  
20 onto third party assets of the customers and the investors  
21 because there's money there. How is that sound policy?

22 MR. SHAPIRO: Well --

23 THE COURT: How does that teach a lesson to the  
24 defendant, the criminals? It's okay, we're going to -- your  
25 obligation, we're going to have the rest of the -- we're going

1 to have poor Becca satisfy it with her \$32.75.

2 MR. SHAPIRO: Well, I understand your question, Your  
3 Honor, but the point is that this is the judgment that Congress  
4 made, that when Congress created this jurisdictional scheme  
5 where they have two arguably inconsistent statutes that seem to  
6 conflict with each other, the toughest part for Your Honor and  
7 for all the courts here is to reconcile these two statutes and  
8 figure it out.

9 Well, in this kind of a situation should the  
10 Government be allowed to seize those -- that particular part of  
11 the account or the crypto and distribute that to crime victims  
12 down the road, a year or two post-conviction or forfeiture, or  
13 should that money be distributed now in this case, and if --  
14 that issue has never been decided in a published decision. I  
15 think I indicated I --

16 THE COURT: Right.

17 MR. SHAPIRO: -- had researched it myself over a  
18 week. The cases that we've cited are cases where the  
19 Government has actually already seized the asset.

20 So, in those cases, GuildMaster was clearly  
21 applicable, and we think it should also be applicable to a  
22 situation where the Government has not yet seized the asset  
23 because we're not trying to seize it for the public. This,  
24 we're trying to seize it for crime victims who were defrauded  
25 based on, you know, wire fraud and money laundering and the

1 like.

2                   And these particular unsecured creditors or creditors  
3 generally in the case are the ones with respect to the  
4 particular BIA accounts that we're talking about, those  
5 creditors signed a contract essentially that they agreed,  
6 including the criminal defendants, Your Honor, where they  
7 agreed that once the money was deposited BlockFi could do what  
8 it wanted with it. The Government didn't sign that contract.  
9 The crime victims in this HashFlare Ponzi scheme didn't sign  
10 that contract. So why should the crime victims suffer as a  
11 result of some contract signed by investors who lost their  
12 investment because they signed a contract that said, we're  
13 giving you our money and you can do with it what you want?

14                  And then they're saying, oh, now I'm suffering  
15 because I'm not going to get paid in full. Well, you know,  
16 it's the Government's view that while we sympathize with those  
17 creditors, we think the crime victims are the larger victims in  
18 the general sense of the word here.

19                  The unsecured creditors, at least to the best of my  
20 knowledge, are not -- they might allege that they've been  
21 victims of a crime, but there's not to my knowledge been any  
22 crime yet asserted against BlockFi or against anyone else with  
23 respect to their lost investment, and that's because they  
24 signed that contract.

25                  THE COURT: All right. I appreciate your argument.

1 Let me hear from the Committee that I'm certain is going to  
2 tell you why they -- in their view what you're seeking doesn't  
3 make sense, and also we have counsel for the JPL who are going  
4 to say you're looking at the wrong law to begin with because  
5 you should first start with Bermuda law.

6 MR. SHAPIRO: Well, I did want to quickly address  
7 that question because --

8 THE COURT: Absolutely.

9 MR. SHAPIRO: -- on the Bermuda law, that we believe  
10 the crimes were committed here in the United States, Your  
11 Honor, and therefore it should be U.S. federal criminal law  
12 that should apply and not Bermuda law.

13 THE COURT: All right. Thank you. Thank you,  
14 counsel, Mr. Shapiro.

15 MR. SHAPIRO: Thank you.

16 THE COURT: Counsel.

17 MS. DWOSKIN: Thank you, Your Honor. Once again for  
18 the record Shari Dwoskin from Brown Rudnick on behalf of the  
19 Committee.

20 I want to address -- and thank you by the way for  
21 laying out that fact pattern. The analogies are -- I take full  
22 responsibility for those, and, you know, this is a -- it's a  
23 tricky case to trace these assets through and to think about it  
24 in terms of assets that we're more used to dealing with.

25 But I want to address first and foremost because I

1 think this is really the thrust of the Government's point the  
2 allegation that Sections 853(k) and (n) really do contradict  
3 what 1334(e) says, and I think frankly, Your Honor, to use  
4 another analogy, we're comparing apples and oranges. We talked  
5 a little bit about 853(k) the last time we were here. That's  
6 the statute that prevents -- and it's very specific about this,  
7 it prevents third parties with a competing interest in property  
8 subject to forfeiture from bringing actions concerning the  
9 validity of that interest except as described in 853(k).

10 So, it explicitly only applies to property subject to  
11 forfeiture, and 853(a) sets out what property subject to  
12 forfeiture is, and forgive my shuffling of papers, but 853(a)  
13 says that any person convicted of a violation of this  
14 subchapter, there's a later chapter that deals with indictment,  
15 punishable by imprisonment for more than one year shall forfeit  
16 to the United States, so the person that's -- the criminal  
17 defendant shall forfeit to the United States, irrespective of  
18 any provision of state law, any property constituting or  
19 derived from any proceeds the persons, the criminal defendant  
20 obtained directly or indirectly as a result of the violation.

21 There's a couple of other provisions that I think  
22 they're not applicable here, one is property used in the  
23 commission of the crime, and the other is interests in a joint  
24 criminal enterprise and a joint venture.

25 But, in essence, the only property in other words

1 that 853(k) applies to is property that was -- that constitutes  
2 proceeds that the criminal defendant received or is derived  
3 from that property.

4 So, here, argue is the only thing the seizure  
5 warrants can possibly refer to, right, is either the actual  
6 crypto that is in the accounts, and as Your Honor knows, you  
7 know, the government already seized the contents of the wallet  
8 account. You know, BlockFi its standard practice was to  
9 actually keep funds, segregate it in those accounts. Those  
10 funds we think fall into this first provision, right, that  
11 they're property constituting proceeds that the criminal  
12 defendant obtained as a result of the crime. That's what the  
13 seizure warrant says. We turned it over.

14 Or what the, you know, funds from the account in the  
15 seizure warrants means we think is the proceeds of what those  
16 criminal defendants received from the commission of their  
17 crime. That is still at BlockFi, right, and we don't know what  
18 the answer to that is yet, right. We don't know what the  
19 amount is that the criminal defendants would receive on account  
20 of the funds, the balance that was in their accounts, the  
21 balance of their accounts at the time the criminal seizure  
22 warrants were served, but we'll find that out, right. That's  
23 the process of a normal bankruptcy case to figure out what  
24 unsecured creditors are going to get. That's the proceeds  
25 that's described in 853(a). That's what the seizure warrants

1 describe, and we're happy to turn that over, right.

2 There's no dispute here about who has the right to  
3 the accounts, right. We don't dispute that the -- you know,  
4 the debtors can turn over the criminal defendants' claim to the  
5 United States.

6 So, I think that that gets around this, you know,  
7 contrast of laws issue. I frankly just don't see it being  
8 there.

9 And I don't think the relation-back doctrine helps  
10 them because once again the relation-back doctrine applies only  
11 to the specific tainted property that's described in 853(a).  
12 In other words, the property that is proceeds of the crime or  
13 that's derived from that.

14 There's a second section. It's 853(p) I believe that  
15 talks about substitute property, which essentially says that if  
16 the criminal defendant has transferred property to a third  
17 party or it's been co-mingled or it's hard to get, the  
18 Government can go after the criminal defendant's other  
19 property, right, to make up the difference.

20 But the relation-back doctrine only applies to  
21 tainted property, not substitute property, and, again,  
22 substitute property can only be seized from the defendant, not  
23 from a third party.

24 So, the Winpar case and the GuildMaster case that Mr.  
25 Shapiro cited are both cases, both of them, all of them, in

1 fact, are cases where the criminal defendant was a debtor,  
2 right, and there I think it's easy to see how the relation-back  
3 doctrine does apply to set the rights of the United States  
4 apart from the rights of individual unsecured creditors, right.

5 If, for example, the crime is committed before the  
6 Chapter -- it's usually a Chapter 7 case, before a Chapter 7  
7 estate came into existence, those funds never entered the  
8 estate because you can only give what you have, right, and the  
9 debtor at the time that they filed for bankruptcy did not have  
10 the right. They didn't -- they may possessed it. They didn't  
11 have a legal interest in the proceeds of this criminal  
12 enterprise.

13 So, for that reason, right, all of these cases say,  
14 well, you know, what the crime -- when the crime predates the  
15 bankruptcy case, the proceeds of that crime never enter the  
16 bankruptcy estate. That's true, right, with respect to a  
17 criminal defendant that is a debtor, but let's think about how  
18 that works here. Okay.

19 If it's true, and they've alleged that is and no  
20 reason to believe it's not true, if it's true that the crimes  
21 that were committed before the criminal defendants put their  
22 money in BlockFi, and the DOJ had a right to those funds, the  
23 DOJ still has a right to those funds, but, again, our  
24 allegation is we just don't have them.

25 So, it gives the DOJ the right to I guess step ahead

1 of other competing interests to those funds, whether those  
2 interests are at FTX, at Alameda, wherever they happen to be,  
3 and if it's the case that the DOJ can trace the crypto to  
4 BlockFi, that's a tainted asset, right, that's an 853 asset.  
5 We just don't think it's fair. We've alleged that it's not  
6 fair.

7 If it turns out that, you know, we -- and through  
8 discovery they find it, that's a tainted asset, and we think  
9 that we need to turn that over, but that's not where we are,  
10 and -- I'll just stop there. That's not where we are, right.  
11 Right now we're at a motion to dismiss. We've alleged we don't  
12 have the cryptocurrency in its entirety or in principal part  
13 that the criminal defendants deposited.

14 I wanted to mention one more case, Your Honor, and  
15 it's another case where the debtor was the defendant because  
16 they're all cases where the debtor was the defendant. This is  
17 the Erpenbeck case out of the Sixth Circuit, and that -- what's  
18 kind of interesting, the FBI literally found a box of cash,  
19 okay, buried in a Chapter 7 debtor's golf course. Okay. The  
20 Chapter 7 debtor was the criminal defendant, and the bankruptcy  
21 estate was still open, although the bankruptcy had concluded  
22 long before, and the Trustee came and said, hey, this is  
23 property of the estate, and the DOJ said, no, the relation-back  
24 doctrine applies because this -- the crime predicated the burying  
25 of the cash I suppose on his golf course, which was true, but

1 the Sixth Circuit found that it was not -- the relation-back  
2 doctrine did not apply because they couldn't trace that cash to  
3 the crime.

4 In other words, the connection is what's really  
5 important. 853(a) matters, right. It matters that this  
6 specific property is property that's derived from the crime.

7 So, even in the case of cash, right, which is  
8 fungible, because they couldn't trace it, it didn't count as  
9 853(a) property until it was property of the estate.

10 We've also alleged that BlockFi, as Your Honor noted  
11 in the fact pattern, was insolvent at the time the seizure  
12 warrants were served. So, you know, unsecured claims would get  
13 less than they would if -- they're going to get less than what  
14 the United States is trying to seize, which is cryptocurrency  
15 equal to the balances of the criminal defendants' accounts at  
16 the time the seizure warrants were served.

17 So, you know, the fact that the relation-back  
18 doctrine applies to tainted property doesn't mean that it  
19 doesn't -- that it applies to anything that BlockFi has, right.  
20 It can apply to what the criminal defendant rights are, and if  
21 somebody else shows up and says, you know, that the criminal  
22 defendants promised me something, you know, I have a claim  
23 against them, they can go fight about that with the United  
24 States in the Western District of Washington.

25 But we are not trying to seize any of those assets.

1 We are not trying to prevent the Government from seizing those  
2 assets. We're trying to prevent the Government from seizing  
3 the assets that are not proceeds of the crime or derived from  
4 proceeds of the crime, and those are the assets that are beyond  
5 either what was actually deposited by the criminal defendants  
6 or what the criminal defendants would receive on account of  
7 their claim.

8 I've gone through this. I -- so I think I've really  
9 addressed all of those. I do want to address very briefly the  
10 United States sovereign immunity argument. 106(a) includes a  
11 broad abrogation and waiver of sovereign immunity with respect  
12 to both Sections 105 and 362 of the Code. This summer the  
13 Supreme Court expounded on what that means in the -- I'm going  
14 to read this because it's -- I just don't want to get it wrong,  
15 the Lac du Flambeau Band of Lake Superior Chippewa Indians  
16 case, and that's 599 U.S. 382, and they're describing the  
17 automatic stay and certain other provisions of the Code.

18 The Supreme Court held that courts can also enforce  
19 these requirements against any kind of non-complying creditor,  
20 whether or not the creditor is a governmental unit, by virtue  
21 of 106(a)'s abrogation of sovereign immunity.

22 So, it's technically true I suppose that the DOJ is  
23 not a creditor, but it's a distinction without a difference  
24 because their only role in this case, the only thing they can  
25 possibly do with respect to BlockFi is stand in the criminal

1 defendants' shoes and the criminal defendants were a creditor.  
2 So, their position in this case is as a creditor seizing the  
3 creditor's property that is their rights against BlockFi.

4 Let me pause and see if Your Honor has any questions  
5 about jurisdiction because I want to turn to the 362(b) (4)  
6 issue, but the jurisdictional issue here is relatively  
7 complicated.

8 THE COURT: No, go ahead. Thank you.

9 MS. DWOSKIN: So, that leads then, I think, to the  
10 next point which is that -- the United States is making, which  
11 is that the -- their subject to the Section 362(b) (4) exception  
12 because criminal forfeiture proceedings are an exercise of  
13 police power, and of course they are, right, but the adversary  
14 proceeding doesn't seek to enjoin the criminal forfeiture  
15 proceeding. It just asks this Court to find that by  
16 transferring the criminal defendants' claim to BlockFi --  
17 against BlockFi to the United States, BlockFi has complied with  
18 the seizure warrants, and the United States is not entitled to  
19 anything else.

20 And, again, you know, the United States has other  
21 avenues to obtain those assets, right. It can obtain the  
22 tainted assets wherever they are. If they can trace them, they  
23 can find out where they are, and it can go get them, or it can  
24 obtain, as 853(p) allows it to do, substitute property from the  
25 defendants, their house, their yacht, their car, whatever they

1 want.

2 So, seizing the criminal defendants' unsecured claim  
3 against BlockFi is a proper exercise of the United States  
4 police power and not subject to the stay. That's why the  
5 Committee had no objection to turning over the funds in the  
6 wallet account. But 362(b)(4) does not apply when the  
7 Government is exercising a pecuniary interest in the debtor's  
8 property.

9 So, in the Nortel Networks case the Third Circuit  
10 held that liquidating a claim to property of the debtors is  
11 primarily an adjudication of private rights rather than an  
12 exercise of public policy. In other words, 362(b)(4) allows  
13 them to take the claim, but not get paid on it. And we think  
14 the legislative history of this section makes that very clear.  
15 We cite it in our brief. The exception permits entry of a  
16 money judgment, but not enforcement of that judgment.

17 And the reasoning of Congress, which is quoted by the  
18 Third Circuit in the Penn Terra case, is that enforcement of a  
19 money judgment would give the Government preferential treatment  
20 to the detriment of all other creditors.

21 It's also in line with Your Honor's ruling in the LTL  
22 case on the State Consumer Protection actions findings that  
23 those actions were excepted from the stay for the purpose of  
24 fixing, but not collecting civil penalties.

25 So, here, by contrast, what the United States is

1 trying to do is not just seize the criminal defendants' claim,  
2 again, to which we have no objection, but to collect on that  
3 claim in full in kind now, which no other creditors are able to  
4 do, and that's beyond what Section 362(b) (4) allows.

5 So, unless Your Honor has any other questions, I'll  
6 cede the podium.

7 THE COURT: No, I don't have any additional questions  
8 for you. Thank you, counsel.

9 MS. DWOSKIN: Oh, I'm sorry, Your Honor.

10 THE COURT: Mr. Aulet.

11 MS. DWOSKIN: Backing up one minute.

12 THE COURT: And then I'm going to go to Mr. Bernard  
13 and then I'll -- Mr. Shapiro, I'll let you respond.

14 MS. DWOSKIN: Yeah, Your Honor's --

15 MR. AULET: Okay, (indiscernible) have the  
16 conversation.

17 MS. DWOSKIN: Oh, let me cede the podium.

18 MR. AULET: I'm sorry. So, I just wanted to --  
19 there's a particular factual assertion that Mr. Shapiro made  
20 that I wanted to respond to where he said that the debtor said  
21 that the money was there. Your Honor, we wouldn't be here if  
22 we believed that the money had been properly traced. I've  
23 spoken to the debtors, and my understanding of what the debtors  
24 conveyed is, to use your analogy, they have \$200 in the bank  
25 account. They did not say that those \$200 they are the same,

1 you know, serial number as the \$200 that was deposited by  
2 criminals.

3 Obviously, that's a factual matter, and of course the  
4 Government would be entitled if this case is not dismissed to  
5 try and trace, but I just wanted to clear up that particular  
6 factual issue.

7 THE COURT: I guess along those lines, the issue that  
8 I raise, and the Court has come to a more fulsome  
9 understanding, when -- even when a bank, and you can go to any  
10 bank teller, you have \$200 in the account. It doesn't  
11 necessarily -- and actually under the UCC and the -- it doesn't  
12 mean you actually have physically \$200 in an account. You have  
13 a debt owing. It's a creditor-debtor relationship between the  
14 bank and the account holder.

15 So, you're free to comment further on that. The  
16 Court is trying to take into account how that relationship  
17 differs from the actual seizing of -- as if it were in a safety  
18 deposit box, but before I return to you, Mr. Bernard.

19 MR. BERNARD: Thank you, Your Honor. We filed  
20 papers. Surprisingly or unsurprising, Bermuda law is  
21 substantially similar to U.S. law with respect to the contents  
22 of the account, and the account holders' rights, in that, you  
23 know, when you look into the account, it's a ledger, it's an  
24 IOU from BlockFi International that I owe you these assets.  
25 The rights of the holders of those accounts are to share pro

1 rata in the assets available to satisfy those claims in a  
2 liquidation. The only variation in Bermuda is that under a  
3 scheme that pro rata right could be modified. A scheme is akin  
4 to our Chapter 11, but does require super majority voting of  
5 the creditors in each class.

6 So, in our situation in Bermuda, we are on track with  
7 the Committee and its representation of what the content of the  
8 account is and what the account holders' rights are with  
9 respect to that account.

10 THE COURT: All right. Thank you, Mr. Bernard. Mr.  
11 Shapiro, anything in reply?

12 MR. SHAPIRO: Yes, Your Honor. So, the conflict of  
13 law question is a relatively new question. We certainly, you  
14 know, will address that if the action is not dismissed. I will  
15 have an opportunity to speak with opposing counsel and also  
16 probably in various motions.

17 But I did want to have an opportunity to kind of  
18 respond to some of the comments made. First is, in all  
19 fairness for the record, BlockFi did indicate after -- later in  
20 the case that the initial representations about the account and  
21 the funds being there was not completely accurate, and we do,  
22 if we end up going to trial, Your Honor, will see, you know,  
23 correspondence reflecting that change of position.

24 But part of what drove this so aggressively at the  
25 beginning was the belief of the Government that what we were

1 seizing was there based on what we were told, and then of  
2 course BlockFi coalesced and was willing to sign a stipulation  
3 turning it all over, and had it not been for the Committee, we  
4 wouldn't be here today.

5 So, I just want to make sure the record is clear that  
6 there is some dispute about, you know, factually about what  
7 happened here, what money was there when the accounts were  
8 seized on the day the warrants were served, what was there at  
9 the time the crimes were committed, and of course, you know,  
10 the tracing issue, we argue, that issue should be decided by  
11 the District Court in the Western District of Washington under  
12 21 U.S.C. 853 and not -- if tracing is relevant and not in this  
13 court because of the jurisdictional framework.

14 So, we're not -- it is conceivably possible that  
15 tracing will be required at some point, whether the matter is  
16 tried in this court, the District Court here in New Jersey, or  
17 in the criminal forfeiture proceeding in Washington, but we  
18 argue that's where it should take place, in Washington, not in  
19 this court because of 21 U.S.C. 853.

20 Then, I think I should address the sovereign immunity  
21 question, which, you know, we had briefed, but essentially that  
22 really boils down to the jurisdictional provision as well. We  
23 think that Congress in 21 U.S.C. 853 because it enacted that  
24 section of the Criminal Code, it essentially carved out the  
25 abrogation in Section 106(a) which does specifically state that

1 actions brought pursuant to Section 105 and 362 sovereign  
2 immunity is waived.

3 So, it essentially kind of like comes full circle  
4 back to the jurisdictional provision. If this court doesn't  
5 have jurisdiction and the only jurisdiction to determine the  
6 scope and enforceability of a criminal seizure warrant is in  
7 the criminal court, then sovereign immunity has not been  
8 waived, and if that's not the case, if 28 U.S.C. 1334(e)(1), if  
9 Your Honor decides that you do have jurisdiction pursuant to  
10 that and the referral statute, then the -- you know, then the  
11 legal conclusion will be that sovereign immunity has been  
12 waived under 106.

13 And then there was some discussion that Ms. Dwoskin  
14 had about LTL that is now being hotly contested in various  
15 cases. We think LTL is distinguishable, Your Honor, because in  
16 that case this Court found authority to stay a civil collection  
17 action to liquidate a claim to judgment.

18 The United States Government is not trying to  
19 liquidate a claim to judgment. We are simply trying to stop an  
20 attempt under Section 105 and the Declaratory Judgment Act to  
21 stop us from seizing an asset in a criminal case, and Section  
22 105 does not have an independent grant of jurisdiction, and the  
23 Federal Declaratory Judgments Act also does not have an  
24 independent grant of jurisdiction.

25 So, we think in LTL, Your Honor we believe relied on

1     Penn Terra where the Third Circuit had addressed a state civil  
2 environmental action explaining that there might be instances  
3 where state regulatory powers impermissibly dilute federal  
4 bankruptcy policy, but we don't think the LTL and Penn Terra  
5 cases apply here because the plaintiff is essentially trying to  
6 enjoin a federal criminal forfeiture proceeding where there's  
7 no question that the seizure would benefit the public welfare  
8 and that the crypto funds would not be kept by the Government.  
9 We're not going to keep the money. It's going to be  
10 distributed to the crime victims where Congress wanted it to  
11 go.

12                 So, I think I've addressed all the questions raised  
13 by my opposing counsel. If Your Honor has any other questions,  
14 please feel free to let me know.

15                 THE COURT: Well, in all candor, after three hearings  
16 on this I'm not sure we haven't covered every aspect of it and  
17 quite well. Kudos to all counsel. Thank you.

18                 MR. SHAPIRO: Thank you. Thank you, Your Honor.

19                 THE COURT: What became clear and I think Mr. Shapiro  
20 acknowledged there is no case law on this --

21                 MR. SHAPIRO: That is correct, Your Honor.

22                 THE COURT: -- on this fact pattern, you know, and I  
23 think it was the last hearing Mr. Shapiro suggested that I  
24 would be making law. Well, so be it. I'm reserving, Number 1.  
25 I think you can glean from my questions at all three hearings

1 that I'm not sanguine with the Government's arguments, that I  
2 am more inclined, especially at the motion to dismiss stage, to  
3 deny the motion to see how it develops with as far as tracing  
4 and other elements.

5           But I want to write on it, and in fairness, when you  
6 write, you sometimes change outlooks. I think it merits a  
7 written opinion. Since poor Becca is not getting all her  
8 money, she'll need to keep working and work on it. So, I want  
9 to do it in the short term. I believe everybody's interests  
10 are better served by having a resolution at least of the motion  
11 to dismiss at this stage.

12           As we were speaking, I see literally the Clerk's  
13 Office forwarded an e-mail to me sending me, Judge --

14           UNIDENTIFIED ATTORNEY: -- Kirsch.

15           UNIDENTIFIED ATTORNEY: -- Kirsch.

16           THE COURT: -- Kirsch's denial of the motion to  
17 withdraw the reference. I'll read through that, but I'm going  
18 to give this all some additional thought, and I appreciate your  
19 briefing and oral arguments.

20           MR. SHAPIRO: Thank you, Your Honor. May I just  
21 address two quick issues?

22           THE COURT: Yes.

23           MR. SHAPIRO: One is, of course, about the Government  
24 shutdown. We'll of course talk to opposing counsel and try to  
25 figure out something reasonable, but please feel free to reach

1 out to us, and we'll try to figure out something that is  
2 mutually --

3 THE COURT: Well --

4 MR. SHAPIRO: -- acceptable if the Government does  
5 shut down on --

6 THE COURT: We don't know --

7 MR. SHAPIRO: -- at midnight on September 30th.

8 THE COURT: -- and I know the Court always has a  
9 couple of extra weeks of hidden money to keep it going. I  
10 don't know if the Department of Justice has that.

11 But going forward with this, if I were to deny the  
12 motion, then there has to be either another answer or another  
13 motion to withdraw the reference. Clearly, in -- I will  
14 resolve whether it's core or non-core as part of my decision,  
15 so that won't be hanging out there, so to speak, for the  
16 District Court.

17 But at this point is there anything immediate as far  
18 as what's going on in the State of Washington or elsewhere that  
19 impacts timing?

20 MR. SHAPIRO: No, Your Honor. That was -- Your Honor  
21 actually addressed my second point, which was that if Your  
22 Honor decides to deny the motion to dismiss and let the  
23 proceeding go forward, we of course would work with opposing  
24 counsel to figure out a schedule, but we would ask that the  
25 Court rule on the core versus non-core --

1                   THE COURT: I think it's appropriate.

2                   MR. SHAPIRO: -- issue so the District Court has an  
3 opportunity to -- if we do refile a motion to withdraw the  
4 reference, to actually have that before it. So thank you.

5                   THE COURT: Absolutely. All right. Thank you.  
6 Counsel?

7                   MS. DWOSKIN: And the only other thing I would raise  
8 is that the confirmation order that was negotiated together  
9 with the DOJ and with the debtors has attempted we think we can  
10 get -- well, Your Honor will decide whether it's acceptable, to  
11 resolve issues that may arise from confirmation, right, if the  
12 Committee goes out of existence. So, we've --

13                  THE COURT: All of those issues, right.

14                  MR. SHAPIRO: Yes, in fact, I can confirm.

15                  For the record, Your Honor, that the United States  
16 has negotiated consensual language. I don't know, I can't  
17 speak for Mr. Sponder and the Office of the U.S. Trustee, but I  
18 can speak for the DOJ Criminal Division, Civil Division, and  
19 Commercial Education Branch, and also been in touch with the  
20 Tax Division, and we have worked out language with both counsel  
21 for the debtors and counsel for the Committee in connection  
22 with what the confirmation order will look like.

23                  THE COURT: The impact --

24                  MR. SHAPIRO: (indiscernible) the plan on Tuesday.

25                  THE COURT: Mr. Sponder has other issues he's going

1 to be (indiscernible).

2 All right. Then thank you, all. If the Court has  
3 any issues or concerns, it needs anything else from you as far  
4 as submissions, we'll reach out for you all. Thanks.

5 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

6 THE COURT: Have a safe trip back.

7 MS. DWOSKIN: Thank you, Your Honor.

8 MR. SHAPIRO: Thank you.

9 MS. DWOSKIN: Thank you.

10 THE COURT: And we are off. Thank you, Mr. Bernard.

11 \* \* \* \* \*

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13 **C E R T I F I C A T I O N**

14 I, COLETTE MEHESKI, court approved transcriber,  
15 certify that the foregoing is a correct transcript from the  
16 official electronic sound recording of the proceedings in the  
17 above-entitled matter and to the best of my ability.

18

19

20 /s/ Colette Meheski

21 COLETTE MEHESKI

22 J&J COURT TRANSCRIBERS, INC.

DATE: September 27, 2023

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